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No. 84-1779

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.
and
UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS' COUNCIL, et al.

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COUNTER-STATEMENT OF PETITIONERS' QUESTION

1. Whether it is a per se abuse of judicial discretion for a federal district court to deny petitioners' Rule 60(b), F.R. Civ. P., motion to vacate a federal court consent decree entered five years earlier to settle a lawsuit enforcing a federal statute, when the moving party has obtained substantial benefits as a result of the consent decree and its motion to vacate is based on a State Supreme Court decision collaterally attacking the validity of the consent decree.

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BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS' COUNCIL, et al.

Respondents, Delaware Valley Citizens' Council for Clean Air, et al, respectfully request this Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit reported at 755 F.2d 38 (3d

Cir. 1985) which is reproduced in petitioners' Appendix at 7a to 25a.

COUNTER-STATEMENT OF THE CASE

In June 1976 the plaintiffs, Delaware Valley Citizens' Council for Clean Air, et al. ("DVCCCA"), brought a citizens' lawsuit to enforce the Clean Air Act, 42 USC 7401 et seq. Named as defendants were the Commonwealth of Pennsylvania and two of its executive officers.[1] The lawsuit sought injunctive relief to compel the Commonwealth to comply with the Pennsylvania State Implementation Plan ("SIP) to establish a motor vehicle inspection and maintenance ("I/M") program in those areas of the

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[1]In addition to the Commonwealth, the other defendants were the Pennsylvania Secretary of Transportation and the Pennsylvania Secretary of the Department of Environmental Resources. The administrator of the United States Environmental Protection Agency was also named as a defendant but was subsequently dismissed when the United States brought its own action against the Commonwealth.

state which had not attained compliance with the national ambient air quality standards for carbon monoxide, 40 CFR 50.8, or ozone, 40 CFR 50.9.[2] The SIP required the Commonwealth to implement the I/M program by May 1, 1975, 40 CFR 52.2038(d)(6), 38 Fed Reg. 32884 (11/28/73).[3]

In February, 1977 the United States commenced its own action against the Commonwealth and the two actions were consolidated. The parties then undertook negotiations to settle the case by way of a consent decree.

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[2]The two geographical areas in which the I/M program was required were the 5 county greater Philadelphia air region and the 5 county greater Pittsburgh air region.

[3]The Commonwealth never challenged the I/M requirement though it had petitioned for review of other aspects of the EPA regulation. Commonwealth of Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3rd Cir. 1974).

While these negotiations were in progress the United States Congress amended the Clean Air Act, P.L. 95-95, 91 Stat. 685 (8/7/77) in ways that were particularly relevant to the negotiations. Among the provisions added to the Clean Air Act was Section 172, 42 USC 7502, which required a state to commit itself by July 1, 1979 to implement an I/M program if it determined that it could not meet the carbon monoxide or ozone national standards by December 31, 1982. In the event that such a state failed to make the commitment it would be ineligible to receive federal-aid highway funds for those areas of the State that were in non-attainment of the air quality standards. Section 176, 42 USC 7506.

Since the Commonwealth acknowledged that it could not attain the air

quality standards by 12/31/82, 45 Fed. Reg. 33610 (5/20/80), the Commonwealth risked the imminent loss of hundreds of millions of dollars annually of federal-aid highway funds if it did not commit itself to implement the I/M program.[4]

The Clean Air Amendments, therefore, had a salutary effect on the negotiations and in August 1978 the consent decree was approved by the Court. Thereafter the Commonwealth submitted the consent decree to the EPA

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[4]An estimate of the highway funds which the Commonwealth might have lost, on an annual basis, is approximately $400,000,000. That is the amount withheld from the Commonwealth in 1982 when the district court, as a civil contempt sanction, enjoined the United States Secretary of Transportation from granting federal-aid highway funds to the Commonwealth. DVCCCA v. Commonwealth, 533 F.Supp. 869 (E.D. Pa. 1982), aff'd 678 F.2d 470 (3d Cir. 1982), cert. den., 459 U.S. 969 (1982).

as evidence of its commitment to the I/M program. 45 Fed. Reg 33611 (5/20/80).

Throughout the negotiations the defendants (the Commonwealth and the two state executive officers) were represented by the Attorney General of Pennsylvania. DVCCCA v. Commonwealth, 674 F.2d 970, 973-74 (3d Cir. 1982). The attorney general never voiced any question as to his legislative authority to enter into a decree that obligated the Commonwealth to implement an I/M program. When the parties indicated their preference for a "franchise system" I/M program the attorney general informed the negotiators that such a system had not been authorized by the legislature. Therefore the consent decree explicitly conditioned the use of a franchise system on future legislative action

(65a).[5] If, however, the legislature failed to adopt franchise system legislation the Commonwealth agreed to employ a "private garage" system (65a) for which legislative authority did exist according to the attorney general. The consent decree, therefore, did not condition the use of a private garage system on any future legislative enactment.

The filing of the consent decree, unfortunately, did not end the Commonwealth's opposition to the I/M program. The first manifestation of this opposition was the state legislature's refusal, in 1979, to pass legislation for a "franchise system" I/M program. Under the terms of the consent decree, then, the Commonwealth was required to implement a "private garage" system. (65a).

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[5]References are to the petitioners' Appendix.

In December 1979 the General Assembly voted for House Bill 739-1979 which called for a one year delay in the I/M program but the bill failed enactment when the legislature could not override the Governor's veto. A consequence of this legislative attempt to interfere with the consent decree, however, was a delay of the I/M program from August 1, 1980, as required by the consent decree (79a), to May 1, 1981 as provided in the modified consent decree. (86a).

The Commonwealth then failed to implement the I/M program by the May 1, 1981 start-up date and the Commonwealth was held to be in violation of the consent decree, DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 5/20/81); aff'd, 674 F.2d 976 (3d Cir. 1982); cert. den. 459 U.S. 905 (1982). As a consequence the district court had to

reschedule the I/M program to May 1, 1982. DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 6/16/81).

The General Assembly then enacted, over the Governor's veto, House Bill 456-1981, Act 99-1981 (10/5/81) which prohibited the Pennsylvania Department of Transportation from expending any funds to establish or implement the I/M program. The Commonwealth was then held to be in civil contempt and a contempt sanction was imposed which barred the Commonwealth from receiving federal-aid highway funds for the greater Philadelphia and Pittsburgh air regions. DVCCA v. Commonwealth, 533 F.Supp 869 (E.D. Pa. 1/22/82); aff'd. 678 F.2d 470 (3d Cir. 1982); stay den. 458 U.S. 1125 (1982); cert. den. 459 U.S. 969 (1982).

The contempt sanction remained in effect sixteen months until the General Assembly enacted Act 3-1983 (5/4/83) authorizing the Pennsylvania Secretary of Transportation to implement the I/M program.

In 1980, almost two years after the consent decree had been approved by the district court two groups of state legislators petitioned the district court for permission to intervene in the federal court action for the purpose of vacating the consent decree but both petitions were denied, DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 3/25/81); aff'd, 674 F.2d 970 (3d Cir. 1982).

While the appeal of the intervention decision was pending in the Circuit Court these legislators, in August 1981, petitioned the Commonwealth

Court of Pennsylvania to enjoin the Pennsylvania Department of Transportation from implementing the I/M program.[6] These petitions did not include the federal court plaintiffs, DVCCA and United States, as parties to the state court proceedings.

Though the General Assembly's attempt to delay the I/M program in December 1979 (House Bill 739-1979) indicated General Assembly recognition of legislative authority for the I/M program, in the Commonwealth Court the state legislators contended that there had been no legislative authority for

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[6] Burd v. Commonwealth of Pennsylvania Department of Transportation, No. 1506 C.D. 1981 (Cmwlth. Ct. of Pa.) and Scanlon v. Commonwealth of Pennsylvania Department of Transportation, No. 1762 C.D. 1981 (Cmwlth. Ct. of Pa.)

the I/M program when the Attorney General entered into the consent decree in 1978.

The Commonwealth Court in April, 1982 rejected the legislators' position and held that legislative authority had existed in 1978 to implement an I/M program. Burd v. Commonwealth, 66 Pa. Commonwealth Ct. 129, 443 A.2d 1197 (5/14/82).

One year after the Commonwealth Court's decision in Burd, supra, the General Assembly enacted Act 3-1983 (5/4/83) which authorized the Department of Transportation to go forward with the I/M program. This purged the Commonwealth's contempt and on May 6, 1983 the district court vacated the contempt sanction to enable the Commonwealth to receive the $400,000,000 of withheld federal-aid highway funds. On May 18, 1983 the district court again

modified the consent decree to establish June 1, 1984 as the new date for start up of the I/M program, a date more than nine years later than the EPA required start up date of May 1, 1975. 40 CFR 52.2038(d)(6), 38 Fed. Reg. 32884 (11/28/73).

The enactment of Act 3-1983, however, did not end the Commonwealth's resistance to the I/M program. Some five months after its passage, and after the federal-aid highway funds had been made available to the Commonwealth, and more than five years after the consent decree had been filed, the Supreme Court of Pennsylvania, in a 3 to 2 divided decision reversed the Commonwealth Court's decision in Burd and held that the Pennsylvania Attorney General had not had legislative authority in 1978 to commit the Commonwealth to implement an

I/M program and declared that the federal court consent decree was a nullity. Scanlon v. Commonwealth, 502 Pa. 577, 467 A.2d 1108 (10/26/83). (26a).

On remand, the Commonwealth Court enjoined the Pennsylvania Department of Transportation from implementing the consent decree. Burd v. Commonwealth, No. 1506 C.D. 1981 (Cmwlth. Ct. 1/9/84). (57a).

Notwithstanding the state court injunction the Pennsylvania Department of Transportation continued its I/M program preparations in conformance with its obligations under the consent decree. Some two months later, on March 5, 1984, the Commonwealth submitted its motion to the district court requesting the court, under Rule 60(b)(5), and (6), Fed. Rules of Civil Proc., to vacate the consent decree

in the light of the state court decisions. The district court, however, denied the motion. DVCCA v. Commonwealth, C. A. 76-2068 (E.D. Pa. 4/13/84) (1a); aff'd, 755 F.2d 38 (3d Cir. 2/11/85). (7a).

The Commonwealth did, finally, implement the I/M program on June 1, 1984, as required by the district court order of 5/18/83, and the program has been operating continuously to the present time.

REASONS FOR DENYING THE WRIT

SUMMARY

Petitioners seek review of the circuit court decision affirming the district court's denial of petitioners' motion to vacate the federal district court consent decree designed to enforce federal environmental legislation. Petitioners filed their motion to vacate more than five years after the consent decree was entered and more than two years after petitioners were held to be in civil contempt.

Motions to vacate final judgments, under Rule 60(b), F.R. Civ. P., are directed to the discretion of the district court. Appellate review of Rule 60(b) decisions are based on an abuse of discretion standard.

The circuit court review found there was a "profound lack of equities in the [petitioners'] position" (23a) and held that the district court had not abused its discretion. This strong, unanimous appellate affirmation of the district court's decision does not warrant yet another review for abuse of discretion.

Petitioners contend that a federal court, as a matter of law, must vacate a federal court consent decree if subsequent to the consent decree a State Supreme Court determines that as a matter of state law, that the federal decree is a nullity. This claim has no support in case law, is contrary to the decisions of this Court and violates the equitable principles for deciding motions to modify or vacate final federal court judgments.

I. THE DISTRICT COURT DID NOT ABUSE ITS JUDICIAL DISCRETION IN DENYING PETITIONERS RULE 60(b) MOTION TO VACATE THE CONSENT DECREE

-A-

The Commonwealth's motion to vacate the consent decree was filed more than five (5) years after the decree was approved by the district court. It was brought pursuant to Rule 60(b), F.R. Civ. P., which provides for equitable relief from final judgments to strike a proper balance between the conflicting principles that litigation be brought to an end and that justice be done. Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir 1978). Rule 60(b) motions, therefore, must be decided on equitable grounds at the sound discretion of the

court. Virgin Islands National Bank v. Tyson, 506 F.2d 802, 804 (3d Cir 1974); Greco v. Reynolds, 416 F.2d 963 (3d Cir. 1969).

The scope of appellate review of Rule 60(b) decisions is limited to a determination of whether the district court decision was an abuse of judicial discretion. United States Steel Corp. v. Fraternal Association of Steelhaulers, 601 F.2d 1269, 1274 (3d Cir. 1979), Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978).

Relief from final judgments is extraordinary and may be granted only upon a showing of exceptional circumstances and even then the party seeking relief must bear a heavy burden to establish that "dangers once substantial, have become attenuated to a shadow."

United States v. Swift & Co., 286 U.S. 106, 119 (1932); and the principle of finality of judgment demands that the party seeking relief demonstrate that absent relief from judgment it will suffer extreme and unexpected hardship. Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977).

Petitioners' motion to vacate was brought under Rule 60(b)(5) and Rule 60(b)(6). Under Rule 60(b)(5) the moving party must demonstrate that it is entitled to relief from the terms of the final judgment (or consent decree) because "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(6) requires the moving party to demonstrate that there is "any other reason justifying relief from

the operation of the judgment." Petitioners have not met the test in respect to either of these rules.

-B-

This citizens' lawsuit to enforce the Clean Air Act, 42 USC 7401 et seq., was commenced in 1976 because the Commonwealth had failed to meet its obligation under the Pennsylvania State Implementation Plan, 40 CFR 52.2020 et seq., to implement a motor vehicle emission inspection and maintenance ("I/M") program by May 1, 1975. 40 CFR 52.2038 (d)(6). The I/M program is one of the United States Environmental Protection Agency ("EPA") requirements designed to attain compliance with the national ambient air quality standards for carbon monoxide, 40 CFR 50.8, and ozone, 40 CFR 50.9.

Now, ten years after the I/M program was scheduled to start, the Commonwealth has still not attained the national air standards for those two air pollutants. Therefore, it cannot be said that the danger which the consent decree was designed to help overcome has been "attenuated to a shadow."

The petitioners acknowledge that the continuation of the I/M program required by the consent decree will not cause them to suffer "extreme and unexpected hardship" because they declare they will continue the I/M program even if the consent decree, is vacated. (23a).

Petitioners fail to meet the danger attentuation test of Swift & Co., supra, and they fail to meet the hardship test of Mayberry, supra. Failure to meet either of these tests would warrant that

petitioners' motion be denied, failure to meet both tests requires that the motion to be denied. The nine year history of this litigation demonstrates that "every branch of the government of the Commonwealth of Pennsylvania - the executive, legislative, and judicial - has fought tooth and nail every effort of plaintiff to make Pennsylvania respect the provisions of a federal statute." DVCCCA v. Commonwealth, Nos. 84-1179 & 84-1208 (3d Cir. 5/14/85); Slip op. p. 18. (Becker, Circuit Judge).

The counter-statement of the case, supra, sets forth the long list of executive, legislative and judicial actions by the Commonwealth to avoid compliance with federal law and federal court orders. These include, inter alia, the violation of the consent decree, DVCCCA v. Commonwealth, C.A. No. 76-2068

(E.D. Pa. 5/20/81); affd. 674 F.2d 976 (3d Cir. 1982); cert. den. 459 U.S. 905 (1982), which caused the I/M program to be delayed twelve (12) months; legislative enactment of House Bill 456, Act 99-1981 (10/5/81) which cut off funds for implementing the I/M program and caused the district court to hold the Commonwealth in civil contempt, DVCCCA v. Commonwealth, 533 F.Supp 869 (E.D. Pa. 1982); aff'd. 678 F.2d 470 (3d Cir. 1982); stay den. 458 U.S. 1125 (1982) (Rehnquist, J.); cert den. 459 U.S. 969 (1982), and caused the I/M program to be delayed an additional twenty five (25) months.

Throughout this period of intense legislative and executive department resistance the Commonwealth was receiving approximately $400,000,000 per year of federal-aid highway funds for

the greater Philadelphia and Pittsburgh air regions.[7] The Commonwealth would have been ineligible for these federal funds unless it had made a firm and binding commitment to implement the I/M program. Section 176, 42 USC 7506. See also 45 Fed. Reg. 33607 et seq. (5/20/80).[8] The Commonwealth, however,

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[7]These funds were temporarily withheld by the civil contempt sanction imposed in January, 1982, DVCCCA v. Commonwealth, 533 F.Supp 869 (E.D. Pa. 1982), until May, 1983 when the state legislature enacted Act 3 - 1983 (5/4/83) and purged the Commonwealth's contempt.

[8]In 1980, when the state of California failed to commit itself to implement an I/M program in the air regions which had not attained national ambient air quality standards for ozone or carbon monoxide federal-aid highway funds were withheld in accordance with the requirements of Section 176. 45 Fed. Reg. 81746 (12/12/80).

has stated it is not prepared to return these federal-aid funds to the federal government if the federal courts were to grant their motion to vacate the consent decree. (22a). Thus, the Commonwealth would have the federal court nullify the consent decree on the basis of the decision of the Pennsylvania Supreme Court, Scanlon v. Commonwealth, 502 Pa. 577, 467 A.2d 1108 (1983), but would retain the fruits of the consent decree as though the decree had not been nullified.

Petitioners contend, despite their years long contumacious opposition to the I/M program, that it was an abuse of judicial discretion for the district court to refuse to "put plaintiffs in a position whereby enforcement of the rights plaintiffs have acquired through-

out this extensive litigation would be in [petitioner's] hands." DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 4/13/84). (2a). In unanimously affirming, the Circuit Court concluded "[W]e find a profound lack of equities in the Commonwealth's position before the district court." DVCCCA v. Commonwealth, 775 F.2d 38 (3d Cir. 4/26/84) (Aldersert, Chief Judge).

In sum, petitioners have failed to meet those tests established by federal courts to warrant a modification or vacation of final judgments. A review of the equities so clearly establishes that they are against the petitioners that further appellate review is unwarranted.

II. THE THIRD CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS

Though petitioners submitted their motion to vacate under Rule 60(b) and the district court properly used equitable principles to decide the motion and the Court of Appeals for the Third Circuit found that the district court had not abused its discretion petitioners, nonetheless, contend that the Third Circuit decision is in conflict with decisions of two other Circuit Courts. Petitioners contention is manifestly unsound since each Rule 60(b) motion is unique and must be decided on equitable principles on its own set of facts and its own merits. Cf., Mayberry v. Maroney. 558 F.2d 1159, 1164 (3d Cir. 1977).

Hoping to avoid the equitable principles which guide Rule 60(b) determinations, petitioners' brief fails to note that their motion to vacate was brought pursuant to Rule 60(b) and that the district court's denial of the motion was correctly reviewed by the Third Circuit under an abuse of discretion standard.

Petitioners suggest that the district court should have vacated the consent decree as a matter of law (Pet. Statement of Question), (Pet. Br. p. 14) because of the Pennsylvania Supreme Court's collateral attack on the federal court consent decree. This is a question which petitioners had not submitted to the district court.

Petitioners have not cited any case which holds that a final federal

court judgment must be vacated as a matter of law. Such a rule does not exist because it could result in severe inequities. Such a rule, applied here, would result in the unjust enrichment of the petitioners who gained hundreds of millions of federal funds by entering into the consent decree and now wish to escape the obligations of that very same decree. That is why all motions for relief from final judgments under Rule 60(b) are decided on equitable rather than legal grounds and why state court decisions subsequent to a final federal court judment, cannot have the effect of nullifying the federal court judgment.

Petitioners cite Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), and West v. Bank of Commerce & Trusts, 167 F.2d 664 (4th Cir. 1948), as cases that are in conflict with the Third

Circuit decision here. Petitioners are mistaken. The cases cited do not involve state court decisions to nullify federal judgments subsequent to a federal court judgment and the vacation of the consent decrees in those cases were made under traditional equitable standards based on the particular facts of the individual cases.

Hence the Third Circuit decision does not conflict with decisions in the other circuits.

III. STATE COURTS MAY NOT ENJOIN FEDERAL COURT JUDGMENTS ENFORCING FEDERAL STATUTES

In Scanlon v. Commonwealth Department of Transportation, 502 Pa. 577, 467 A.2d 1108 (1983), two groups of state legislators sought to enjoin the executive branch of the Commonwealth from

implementing the I/M program mandated by the federal court consent decree. Neither DVCCCA nor the United States, plaintiffs in the federal action, were parties to the state court proceeding.

In the state court proceeding, involving only the three branches of the Commonwealth government, the Pennsylvania Supreme Court held that legislative authority for an I/M program had not existed when the consent decree was entered and the court declared the federal decree to be a nullity and unenforceable. (42a) Thereafter the Commonwealth Court enjoined the Pennsylvania Department of Transportation "from carrying out the terms and conditions of the Consent Decree." Burd v. Commonwealth Department of Transportation, No. 1506 C.D. 1981 (Cmwlth Ct. 1/9/84). (58a).

Though the state court injunction has been in force since January 1984 petitioners have never conformed to its terms. Instead, petitioners chose to abide by the requirements of the federal court consent decree; they implemented the I/M program on June 1, 1984 and have continued to operate the program ever since. Nevertheless, petitioners maintain that the federal courts must give full faith and credit to the decision of the Pennsylvania Supreme Court and must vacate the federal decree. Petitioners' contention is without support in law.

Since McKim v. Voorhies, 11 U.S. (7 Cranch) 279 (1812), when this Court declared "[t]he State Court has no jurisdiction to enjoin a judgment of the Circuit Court of the United States..." Id. at 281, the federal courts have

consistently upheld the rule of comity which requires state courts to recognize and honor federal court judgments. In Embry v. Palmer, 107 U.S. 3 (1882) this Court declared:

> "[T]he judgments of the courts of the United States have invariably been recognized, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced... The rule for determining what effect shall be given to such judgments is that declared by this court, in respect to the faith and credit to be given to the judgments of State courts in the courts of other States."

107 U.S. at 10.

Central National Bank v. Stevens, 169 U.S. 432 (1898) held that "the exemption of the authority of the Courts of the United States from interference by legislative or judicial action of the

States is essential to their independence and efficiency." Id. at 460-61. And in Stoll v. Gottlieb, 305 U.S. 165 (1938) this Court ruled that:

> "[T]he judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where judgment or decree of the federal court determines a right under a federal statute, that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" [Citations omitted].
> (emphasis added).

305 U.S. at 170.

Whether grounded on the doctrine of res judicata, full faith and credit or the Supremacy Clause of the United States Constitution, Article VI, the federal courts have consistently defended

federal court judgments from direct and collateral attack by state courts. "It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts given the basic requirement that state courts honor the courts in other states and that federal courts must honor state court judgments." 18 C. Wright, A. Miller & E. Cooper § 4468 (1981), Federal Practice and Procedure. See also, Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976).

Petitioners do not question the federal subject matter jurisdiction of this action, nor do they question the authority of the Pennsylvania Attorney General to represent the Commonwealth and the other defendants in the action. What petitioners do question is the scope of the Attorney General's authority when

he negotiated the consent decree. But that question is clearly ancillary to the enforcement of the federal statute; it could have been raised before the final federal court judgment was entered. Now, more than five years after that judgment was entered, the doctrine of res judicata bars relitigation by the parties or their privies of issues that were or could have been raised in the original action. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 162 S. Ct. 1883, 1889 n.6 (1982); Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981).

The res judicata doctrine has also been recognized by the courts of Pennsylvania to bar relitigation of matters ancillary to federal court judgments where there was federal law subject matter jurisdiction. Thus in London v. Philadelphia, 412 Pa. 496, 194

A.2d 901 (1963) the Pennsylvania Supreme Court declared:

> "Once the federal court validly acquired jurisdiction, its jurisdiction extended to all matters ancillary to the main cause of action even though the ancillary matter lacked federal jurisdictional requisites..."
> (emphasis added)

412 Pa. at 499, 194 A.2d at 902-03. Similarly in Bardo v. Commonwealth, 40 Pa. Commonwealth 558, 397 A.2d 1305 (1979) the state appellate court noted:

> "It is clear that a federal court decision is res judicata in subsequent state proceedings..."

Id. at 587 n. 1, 397 A.2d at 1307 n. 1, See also Williams v. Wilkes, 14 Pa. 228, 231 (1850).

The federal and Pennsylvania state courts have long recognized that

the doctrine of res judicata bars the state courts from interfering with federal judgments implicating federal law. The decision in Scanlon is an aberration in that judicial history. Therefore review of the Circuit Court's judgment is not warranted.

CONCLUSION

For the foregoing reasons Respondents, Delaware Valley Citizens Council for Clean Air, respectfully request this Court deny the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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